

This document relates to the Health and Care (Staffing) (Scotland) Bill (SP Bill 31) as introduced in the Scottish Parliament on 23 May 2018

# Health and Care (Staffing) (Scotland) Bill

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## Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Health and Care (Staffing) (Scotland) Bill. It describes the purpose of each of the delegated powers in the Bill and outlines the reasons for seeking the proposed powers to make subordinate legislation and to issue guidance. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

### Outline of Bill provisions

3. The aim of the Bill is to be an enabler of high quality care and improved outcomes for service users in both the health service and care services by helping to ensure appropriate staffing for high quality care, with an approach to decision-making relating to staffing requirements which takes account of service user needs and promotes a safe environment for both service users and staff.

4. The Bill creates a statutory duty on geographical Health Boards, the Common Services Agency for the Scottish Health Service ("the Agency"), the 4 Special Health Boards that deliver clinical health care services (the State Hospitals Board, NHS 24, the National Waiting Times Centre Board and the Scottish Ambulance Service Board) and all care service providers, to ensure that there are appropriate numbers of suitably qualified staff providing care, alongside guiding principles to be taken into account when carrying out this duty.

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5. The Bill requires the health bodies described in paragraph 4 above to follow a staffing methodology, including the use of staffing and professional judgement tools, when determining staffing levels in certain specified healthcare settings. The Bill makes a number of associated changes to the National Health Service (Scotland) Act 1978 (“the 1978 Act”).

6. The Bill also includes a function for Social Care and Social Work Improvement Scotland (“SCSWIS”) to work in collaboration with the care sector to develop and validate appropriate methodologies and tools for care home settings for adults, in the first instance, with powers for the Scottish Ministers to require the use of such methodologies and tools and to extend SCSWIS’ development function to cover other care settings in the future. The Bill makes a number of associated changes to the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”).

## Rationale for delegated powers

7. In deciding whether provisions should be specified on the face of the Bill or delegated, we have carefully considered the importance of each matter against the need to:

- achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in light of experience, without the need for primary legislation;
- ensure the proper use of parliamentary time is made; and
- acknowledge that safe staffing methodologies and their tools are neither static in their development nor in the areas or staffing groups to which they could be applied. The legislation therefore requires a proportionate degree of flexibility to ensure it continues as an enabler of high quality care.

8. The relevant provisions are described in detail below. For each provision, the memorandum sets out:

- The person upon whom the power is conferred and the form in which the power is to be exercised;
- Why it is considered appropriate to delegate the power and the purpose of each provision; and

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- The parliamentary procedure to which the exercise of the power is to be subject, if any, and why it was considered appropriate to make it subject to that procedure.

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## Delegated powers

### Part 2 – Staffing in the NHS

#### Section 4 – NHS duties in relation to staffing (insertion of section 12IB(3) – duty to follow common staffing method)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

#### **Provision**

9. Section 12IB(3) of the 1978 Act, to be inserted by section 4(2) of the Bill, contains a power enabling the Scottish Ministers to prescribe staffing level tools and professional judgement tools that Health Boards, the Agency and certain Special Health Boards are to use as part of the common staffing method, and the frequency at which those tools are to be used.

#### **Reason for taking power**

10. The common staffing method in new section 12IB(2), to be used in relation to health care types set out in new section 12IC, requires the use of a staffing level tool and a professional judgement tool. Prescribing the tools will ensure consistency as to which specific tools are used for each health care setting, and their frequency of use. The reason for taking the power to prescribe the tools, rather than setting them out on the face of the Bill, is to allow flexibility and ease of updating as new versions of current tools, or new tools, are developed, thus ensuring that Health Boards and others are always required to use the most up to date tool. It avoids the need to make such changes in primary legislation and, in the view of the Scottish Ministers, makes best use of Parliamentary time.

11. Flexibility is a particularly important consideration here given that the tools are currently accessed via an IT platform (accessible to all NHS sites in Scotland and registered users) and so different software versions may need to be specified in order to achieve legal certainty.

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## **Choice of procedure**

12. Changing the description or frequency of use of tools is a relatively non-controversial and straightforward matter. Given the nature of the provision that can be made and the nature of the tools, it is considered that a power subject to negative procedure is appropriate and strikes the appropriate balance between flexibility and the need for scrutiny of provision of this nature.

## **Section 4 – NHS duties in relation to staffing (insertion of section 12IB(4) – duty to follow common staffing method)**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

## **Provision**

13. Section 12IB(4) of the 1978 Act, to be inserted by section 4(2) of the Bill, contains a power enabling the Scottish Ministers to change the description of the common staffing method set out in new section 12IB(2).

## **Reason for taking power**

14. The common staffing method set out in section 12IB(2) is based on the method that has been developed for use with the existing staffing level tools, which, with the exception of a multi-disciplinary emergency care tool, have been developed to inform staffing decisions in relation to nursing and midwifery staff. Scottish Ministers are conscious that, with an increasing focus on multi-disciplinary working, there is likely to be a movement away from tools covering single professions, such as nursing and midwifery, towards tools which encompass the multi-disciplinary team. The introduction of tools covering multi-disciplinary teams, including other professions, may require changes in the detailed steps of the common staffing method currently set out in paragraphs (a) to (d) of subsection (2) that have not yet been anticipated, for example the inclusion of a step to consider the input of different staffing groups within the team.

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## **Choice of procedure**

15. The power is subject to affirmative procedure by virtue of section 4(4) of the Bill which amends section 105(3) of the 1978 Act. Regulations made under section 12IB(4) would amend the common staffing method set out in the Bill. This is considered to be the appropriate level of Parliamentary procedure when making textual amendments to primary legislation.

**Section 4 – NHS duties in relation to staffing (insertion of section 12IC(3) – common staffing method: types of health care)**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

## **Provision**

16. Section 12IC(1) of the 1978 Act, to be inserted by section 4(2) of the Bill, lists the types of health care to which the section 12IB duty to follow the common staffing method applies. The descriptions of health care types, and associated locations and employees, are listed in the table in section 12IC(1). Section 12IC(3) contains a power enabling the Scottish Ministers to modify any aspects of the descriptions of health care in that table (and as further described in section 12IC(2)), which would enable new descriptions of health care to be added, and existing descriptions to be changed or deleted.

## **Reason for taking power**

17. The common staffing method requires the use of a staffing level tool, and as such the common staffing method can only be followed where such a tool exists. The descriptions of health care type, location and the relevant staffing group listed in the section 12IC(1) table are those for which a staffing level tool is presently available and for which particular tools will initially be prescribed using the section 12IB(3) power described above.

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18. The development of staffing level tools is an on-going process, with the existing tools being kept under constant review, alongside the development of new tools. Therefore, there will be a need to adjust the table in 12IC(1) to expand descriptions of types of health care where new tools have been developed, or existing tools have been modified to encompass a different location or employee type. The anticipated move towards multi-disciplinary staffing level tools in the future, for example, might require the “employees” entry for one of the existing types of health care in 12IC(1) to be expanded to cover wider staff groups. It could also arise that types of health care contained in the table will need to be removed should the staffing level tool for that type of health care be found to be out of date and no longer providing reliable data.

19. Without taking this power, any changes to the type of health care covered by the duty to follow the common staffing method would require primary legislation. This would hinder the flexibility to act either in introducing new health care areas or removing areas where the staffing level tool no longer ensured safe and effective staffing, limiting the ability to have a system that continually ensures appropriate staffing for high quality care.

### **Choice of procedure**

20. The power is subject to affirmative procedure by virtue of section 4(4) of the Bill which amends section 105(3) of the 1978 Act. Regulations made under section 12IC(3) would amend the table set out in the Bill in section 12IC(1), and are therefore subject to affirmative procedure. This is considered to be the appropriate level of Parliamentary procedure when making textual amendments to primary legislation.

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## Section 4 – NHS duties in relation to staffing (insertion of section 12IF – Ministerial guidance on staffing)

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: not applicable

### **Provision**

21. Section 12IF of the 1978 Act, to be inserted by section 4(2) of the Bill, gives the Scottish Ministers a power to issue guidance about the duties imposed by sections 12IA to 12IE, including the related duties in section 2 of the Bill to have regard to the guiding principles, and requires the Scottish Ministers to publish such guidance. It places a corresponding obligation on Health Boards and the Agency to have regard to any such guidance. Section 12IF(3) requires the Scottish Ministers to consult Health Boards, Special Health Boards, integration authorities, Healthcare Improvement Scotland, the Agency, trade unions and professional bodies, and other persons Ministers consider appropriate before issuing guidance or revised guidance.

### **Reason for taking power**

22. It is considered helpful for Ministers to issue guidance as a resource to those implementing staffing methods under the Bill which can set out best practice, examples, case studies, and take into account a wide range of possible practical scenarios and circumstances. Guidance is considered appropriate in these circumstances, where the content is operational and practical in nature. The level of detail that is required in the guidance is beyond that which would normally be contained in primary legislation.

23. Provision of health care and staffing requirements by Health Boards and the Agency can vary greatly depending on the type of health service, location and staff group. The guidance provides clarity and the necessary flexibility in considering how the requirements can be operationalized and implemented. Guidance will cover a range of areas, including for example the considerations and evidence that could be provided when reporting on the general duty in 12IA; providing more detail on how Health Boards might fulfil the duty to follow the common staffing method, including but not



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restricted to relevant quality measures to be considered as per section 12IB(2)(b) or the types of considerations that would be relevant to local context as per section 12IB(2)(c)(ii); or providing guidance about how staff and patient views should be taken into account as per section 12IB(2)(c)(iv) and (v).

24. In addition, guidance will provide more detail in relation to risk identification and appropriate clinical advice in section 12IB(2)(d)(ii) and (iii), including clarifying when advice should be sought and the seniority of the individual from which the advice should be sought in different situations, which might include when the advice of the Nurse Director or Medical Director should be sought. Guidance may need to be updated regularly to reflect how practice evolves so is considered to be a more responsive and flexible way of supporting health bodies rather than, say, a power to make subordinate legislation.

## Part 3 – Staffing in care services

### Section 8 – Ministerial guidance on staffing

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: not applicable

#### **Provision**

25. Section 8 of the Bill gives the Scottish Ministers a power to issue guidance about the duties imposed by sections 6 and 7. It places a corresponding obligation on care providers to have regard to any such guidance in implementing the relevant duties. Section 8(2) requires Scottish Ministers to consult SCSWIS, persons representative of care providers and users of care services, trade unions and professional bodies, as well as such other persons considered appropriate before issuing guidance or revised guidance. Any guidance issued must be published.

#### **Reason for taking power**

26. It is considered helpful for Ministers to issue guidance as a resource to those implementing staffing methods under the Bill which can set out

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best practice, examples, case studies, and take into account a wide range of possible practical scenarios and circumstances. Guidance is considered appropriate in these circumstances, where the content is operational and practical in nature. The level of detail that is required in the guidance is beyond that which would normally be contained in primary legislation

27. The staffing methods could vary greatly depending on the care service affected, and guidance provides the necessary flexibility in these circumstances. It also provides the ability to allow the guidance to be updated regularly to reflect how practice evolves so is a more responsive and flexible way of supporting relevant authorities rather than, say, a power to make subordinate legislation.

## Section 10 – Functions of SCSWIS in relation to staffing methods (insertion of section 82A(1) – development of staffing methods)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

### **Provision**

28. Section 82A(1) of the 2010 Act, to be inserted by section 10 of the Bill, gives SCSWIS the function to develop and recommend staffing methods in the first instance for providers of care home services for adults. Section 82A(1)(b) gives the Scottish Ministers a power to specify other care services thereby extending that function to develop and recommend staffing methods.

### **Reason for taking power**

29. It is the intention that care homes for older people would be the first care setting for which a tool be developed, as such an approach has the opportunity to build on work presently being undertaken. The initial restriction to care homes for adults will provide an opportunity to test and evaluate the approach and its impact on quality of care and people's

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experiences, enabling SCSWIS and the Scottish Ministers to make an informed judgement as to when it should be extended to other care services.

### **Choice of procedure**

30. The power taken here is narrow. It allows for bringing in additional care services in the context of a procedure for development that is set out on the face of the Bill. This is an appropriate balance of scrutiny and the best use of Parliamentary time.

**Section 10 – Functions of SCSWIS in relation to staffing methods (insertion of section 82A(3) – development of staffing methods)**

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: not applicable

### **Provision**

31. Section 82A(3) of the 2010 Act, to be inserted by section 10 of the Bill, gives the Scottish Ministers power to issue guidance about section 82A and contains a corresponding duty for SCSWIS and those that SCSWIS is to collaborate with.

### **Reason for taking power**

32. It is considered helpful for Ministers to issue guidance as a resource to those developing staffing methods under the Bill. Guidance is considered appropriate in these circumstances, where the content is operational and practical in nature. The level of detail that is required in the guidance is beyond that which would normally be contained in primary legislation. It also provides the ability to allow the guidance to be updated regularly to reflect how practice evolves so is a more responsive and flexible way of supporting relevant authorities rather than, say, a power to make subordinate legislation.

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33. It is intended that the guidance will be used to provide some details of collaboration needed to develop staffing methods including who should be involved. This would be particularly important in indicating who should be involved when the legislation is extended to include care services other than care home services for adults.

**Section 10 – Functions of SCSWIS in relation to staffing methods (insertion of section 82B(1) – regulations: requirement to use staffing methods)**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** affirmative

### **Provision**

34. Section 82B(1) of the 2010 Act, to be inserted by section 10 of the Bill, contains a power enabling the Scottish Ministers to require the use of staffing methods developed and recommended by SCSWIS (either as recommended by SCSWIS or with modifications). Section 82B(2) provides further detail as to what may be prescribed, covering the types of care settings, the staff groups to whom this staffing method would apply, and the tools to be used and their frequency of use.

### **Reason for taking power**

35. At this moment in time there are no appropriate staffing methods that have been agreed for use in care settings. It is therefore not possible to set out a staffing method for care settings on the face of the Bill in the way that has been done for health. Taking this power enables Parliament to have an opportunity to scrutinise the method before it is required for all the defined care service providers. It also enables methods to be adjusted in the future in light of experience.

### **Choice of procedure**

36. The power is subject to affirmative procedure by virtue of section 11 of the Bill which amends section 104 of the 2010 Act. This procedure is

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considered appropriate given that the regulations will require the use of staffing methods by care service providers for the first time. This is expected to attract a high level of interest not only from the public (especially those who receive care, including the families of those receiving care) but also from those who manage and deliver care.

## Part 4 – general provisions

### Section 12 – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if amends primary legislation, otherwise negative

#### **Provision**

37. Section 12(1) of the Bill provides that the Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate in connection with or for giving full effect to the Bill. Section 12(2) allows regulations under section 12(1) to modify any enactment, including this Bill.

#### **Reason for taking power**

38. As with any new body of law, this Bill may give rise to a need for a range of ancillary provisions. For example, consequential provision may be required to make necessary changes to related legislation. Without the power to make supplementary, incidental and consequential provision, it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with technical, operational or implementation matters clearly within the scope and policy intentions of the original Bill.

39. That would not be an efficient use of resources by the Parliament or the Scottish Government. The power, whilst potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so.

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40. It is considered that the power is necessary for the above reasons, and that the power should extend to the modification of enactments.

### **Choice of procedure**

41. The Bill provides that Regulations made under section 12 which modify an Act will be subject to the affirmative procedure. This is the appropriate procedure when making textual amendments to primary legislation. In all other cases, Regulations made under section 12 are subject to the negative procedure. These procedures are typical for ancillary powers.

### **Section 13 – Commencement**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

### **Provision**

42. Sections 12, 13 and 14 come into force on the day after Royal Assent and section 13(2) enables the Scottish Ministers to commence the remaining provisions in the Bill on such day or days as they appoint. Section 13(3) provides that commencement regulations may include transitional, transitory, or saving provision and make different provision for different purposes. These aspects are not substantive powers but are dependent on commencement.

### **Reason for taking power**

43. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable.

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### **Choice of procedure**

44. As is usual for commencement regulations, the power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010.

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